Malaysian International Tuna Port Sdn Bhd v OSK Trustee Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–809 OF 2009
ZABARIAH JC
12 FEBRUARY 2010

Civil Procedure — Injunction — Application for — Defendants' refusal to allow plaintiff from further drawing from disbursement account — Whether refusal prevented plaintiff from recommencing construction works — Whether defendants should be restrained from calling an immediate event of default against plaintiff — Whether there were serious questions to be tried — Whether damages adequate remedy in event plaintiff succeeds at trial — Balance of convenience — Whether greater harm would result from withholding injunctive relief — Whether there was non-disclosure of material facts when plaintiff made ex parte application — Effect of

By a concession agreement ('CA') dated 16 December 2004, the Lembaga Kemajuan Ikan Malaysia ('LKIM') granted the plaintiff, a joint venture company, the concession to carry out upgrading works on the Kompleks Lembaga Kemajuan Ikan Malaysia ('the project') in Pulau Pinang and to manage and operate the said complex. In order to finance the plaintiff's upgrading works under the CA, the plaintiff issued Islamic bonds in the form of Bai Bithman Ajil Islamic Securities facility ('the BAIS facility') to the value of RM240m. The first defendant trustee, who was appointed under a trust deed, acted for the holders of the BAIS facility, while the second defendant and RHB Bank were the lead arrangers and first subscribers of the BAIS facility. Under the BAIS facility the plaintiff was required to make two types of payments, namely the payment on the primary BAIS securities valued at RM240m upon maturity and the payment on the secondary BAIS securities, which were repayable twice per annum. Of the RM240m BAIS facility, RM135m was for the financing of the construction of certain additional facilities. All proceeds raised from the issuance of the BAIS facility were captured in a designated disbursement account ('DA'), which was operated solely by the first defendant as trustee. Under the trust deed the plaintiff was allowed to draw on the DA for purposes of its construction of the additional facilities on condition that all disbursements were supported by invoices or certificates or other documents to evidence work completed to the satisfaction of either an engineer or an architect. On 4 September 2007, the Government of Malaysia declared a stop order on the construction works carried out in relation to the project in view of new legal or regulatory requirements, which stop order was then allegedly lifted by the government on 16 September 2008. The plaintiff claimed that despite

informing the defendants that it was ready and willing and able to recommence construction and that LKIM had extended the completion date for the construction of the additional facilities to 31 December 2010, the defendants refused to allow the plaintiff further drawdowns and withdrawals from the DA, which resulted in the plaintiff being unable to proceed with the construction of the additional facilities. The plaintiff further claimed that on 24 September 2008, the defendants informed the plaintiff that the construction works ought not to recommence until the plaintiff complied with the scheduled payment dates and that if the plaintiff failed to make payments according to the scheduled payment dates, then this would lead to the entire outstanding BAIS, which amounted to RM378.82m, becoming due and payable immediately. According to the plaintiff the requirement to make payments on scheduled dates and the consequences of such non-payment were additional conditions, which were unilaterally imposed by the defendants. The first defendant had also written to the plaintiff stating that the latter's failure to pay the sum of RM10,208,750 by 17 November 2009, would be an event of default. The plaintiff thus filed the present application for injunctive relief to restrain the defendants from calling for an event of default until such time when the issues between the parties were resolved. It was the plaintiff's contention that in the event that the defendants were not so restrained it would, inter alia, result in the objective of the CA being defeated. In determining whether to grant a prohibitory injunction the court had to determine whether from the facts the defendants had prevented the plaintiff from drawing from the DA and whether this had resulted in the plaintiff's inability to recommence the construction work, which deprived the plaintiff of a substantial amount of income, and whether the defendants had imposed unilateral terms to prevent the plaintiff from drawing from the BAIS facility.

Held, dismissing the application with costs:

(1) The facts showed that the entire subject matter of the project, which constituted the substratum of the agreement, ie the land and the sea was not there, because there was a probability that the leases to the land and sea, where the additional facilities were to be constructed, may never be given by the current State Government of Penang as the state was now 'in the hands of the opposition parties'. Therefore, even if it were presumed that the defendants did prevent the plaintiff from executing the drawdown, the non-existence of the land and sea meant that the plaintiff would still not have been able to recommence construction on the additional facilities. Further, it was a mandatory requirement of the trust deed that any drawdown by the plaintiff to finance the construction work must be supported by documents certified by either an engineer or an architect as to the amount of the works done, and the documentary evidence must be in a form acceptable to the first and second defendants as trustee and facility agent respectively. The plaintiff knew of this

mechanism as there had been thirteen previous progress claims made by it for drawdown. However, in the present case since it was not possible to commence any construction work without the land and the sea, then logically disbursement from the BAIS facility was next to impossible. Hence the plaintiff's contention that its inability to commence works was attributed to the act of the first or second defendant was grossly misconceived. This was therefore not a triable issue and on this ground alone the plaintiff's application could have been dismissed (see paras 40–41, 43 & 46–51).

(2) As of 16 December 2008 it was clear that the plaintiff was financially strapped and was unable to make payments due under the BAIS facility. This fact coupled with the concerns as to whether the stop work order would be lifted or that there would be a recommencement of the construction works gave the defendants in the present case cause for concern. The plaintiff on the other hand had repeatedly affirmed in its letters to the defendants and as recorded in the minutes of meetings, that it would redeem the BAIS facility by 17 November 2009. Due to these repeated assurances by the plaintiff that the BAIS facility would be fully redeemed by 17 November 2009, the first defendant and the BAIS holders had not called for an event of default. As such, these assurances amounted to promises and contractual obligations, which were binding on the plaintiff, and the plaintiff was estopped from denying them. Besides this obligation the plaintiff also had the secondary obligation to make a payment in the sum of RM10,208,750 on the secondary BAIS facility by 17 November 2009. Consequently regardless of whether the defendants were in breach as alleged by the plaintiff, the plaintiff could not run away from its obligation to fully redeem the BAIS facility on 17 November 2009 and from meeting its payment on the secondary BAIS, which was also due on the same date. In view of the fact that the payment of the secondary BAIS was a contractual obligation there was no justification for the application for an injunction to prevent payment before 17 November 2009 (see paras 54, 63–65, 70, 72–75, 77, 111–112 & 114).

(3) The plaintiff had admitted that its losses were purely monetary and as such damages would be an adequate remedy even if the plaintiff was correct in its allegation. Further since the plaintiff was merely a special purpose vehicle there were no legitimate concerns about it losing any reputation (see paras 93 & 95).

(4) Issuing the injunction prayed for would not resolve the problems the plaintiff was facing but it would in fact deprive the BAIS holders of what they were entitled to under the CA (see para 98).

(5) The plaintiff had failed to disclose material facts to the court when making its ex parte application. The fact that the plaintiff had repeatedly

given an undertaking to redeem the entire BAIS facility on 17 November 2009, and that it was aware there was no land and sea for the additional facilities to be constructed were material facts, which if disclosed would have resulted in the ex parte order not being granted in the first place. Further, as the non-disclosure of material facts was either deliberate or reckless, it would disentitle the plaintiff of any equitable relief (see paras 107, 110 & 115).

[Bahasa Malaysia summary

Melalui perjanjian konsesi ('PK') bertarikh 16 Disember 2004, Lembaga Kemajuan Ikan Malaysia ('LKIM') telah memberi plaintif, sebuah syarikat perniagaan bersama, konsesi untuk menjalankan kerja-kerja menaik taraf Kompleks Lembaga Kemajuan Ikan Malaysia ('projek tersebut') di Pulau Pinang dan untuk mengurus dan mengendalikan kompleks tersebut. Untuk membiayai kerja-kerja menaik taraf plaintif di bawah PK, plaintif telah mengeluarkan bon-bon Islam dalam bentuk kemudahan Sekuriti Islam Bai Bithman Ajil ('kemudahan SIBA') berjumlah RM240 juta. Defendan pertama, pemegang amanah, yang dilantik di bawah surat ikatan amanah, bertindak bagi pemegang-pemegang kemudahan SIBA tersebut manakala defendan kedua dan RHB Bank adalah penyusun utama dan pelanggan pertama kemudahan SIBA tersebut. Di bawah kemudahan SIBA, plaintif dikehendaki membuat dua jenis bayaran, iaitu bayaran bagi sekuriti SIBA utama berjumlah RM240 juta apabila ia matang dan bayaran bagi sekuriti SIBA sekunder, yang harus dibayar dua kali setahun. Daripada RM240 juta kemudahan SIBA tersebut, RM135 juta adalah untuk pembiayaan kerja pembinaan bagi kemudahan tambahan tertentu. Semua hasil kutipan daripada pengeluaran kemudahan SIBA tersebut telah dikesan di dalam akaun pembayaran ('AP') khusus yang mana telah dikendalikan semata-mata oleh defendan pertama sebagai pemegang amanah. Di bawah surat ikatan amanah, plaintif dibenarkan untuk membuat pengeluaran ke atas AP bagi tujuan membina kemudahan tambahan dengan syarat bahawa kesemua pembayaran disokong oleh invois-invois, sijil-sijil atau dokumen-dokumen yang lain untuk membuktikan kerja yang telah siap bagi kepuasan sama ada jurutera atau arkitek. Pada 4 September 2007, kerajaan Malaysia telah mengisytiharkan perintah berhenti ke atas kerja-kerja pembinaan yang dijalankan berkaitan dengan projek tersebut menurut keperluan undang-undang atau peraturan baru, yang mana perintah berhenti tersebut didakwa telah dibatalkan oleh kerajaan pada 16 September 2008. Plaintif mendakwa bahawa meskipun defendan-defendan telah memberitahu bahawa ia bersedia dan boleh memulakan semula pembinaan dan bahawa LKIM telah melanjutkan tarikh penyempurnaan bagi pembinaan kemudahan tambahan kepada 31 Disember 2010, defendan-defendan menolak untuk membenarkan plaintif pengeluaran selanjutnya atau membuat pengeluaran daripada AP, yang mana menyebabkan plaintif tidak dapat meneruskan pembinaan kemudahan tambahan tersebut. Plaintif selanjutnya mendakwa bahawa pada 24 September 2008,

defendan-defendan telah memberitahu plaintif bahawa kerja-kerja pembinaan tidak seharusnya dimulakan sehingga plaintif telah mematuhi tarikh pembayaran yang dijadualkan dan bahawa sekiranya plaintif gagal untuk membuat bayaran mengikut tarikh pembayaran yang dijadualkan, ini akan menyebabkan keseluruhan SIBA yang belum diselesaikan, yang mana berjumlah RM378.82 juta, tertunggak dan perlu dibayar serta-merta. Menurut plaintif, keperluan untuk membuat bayaran pada tarikh yang dijadualkan dan akibat tidak membayar adalah syarat-syarat tambahan, yang mana secara unilateral dikenakan oleh defendan-defendan. Defendan pertama juga telah menulis kepada plaintif dan menyatakan bahawa kegagalan plaintif untuk membayar jumlah sebanyak RM10,208,750 pada 17 November 2009, adalah suatu pelanggaran. Plaintif justeru telah memfailkan permohonan ini bagi relief injunksi untuk menghalang defendan-defendan daripada memohon untuk pelanggaran sehingga tempoh di mana isu-isu antara pihak-pihak telah selesai. Adalah menjadi hujahan plaintif bahawa sekiranya defendan-defendan tidak dihalang, ianya, antara lain, akan menyebabkan kegagalan objektif PK tersebut. Dalam menentukan sama ada injunksi larangan harus diberikan, mahkamah harus memutuskan sama ada daripada fakta-fakta, defendan-defendan telah menghalang plaintif daripada membuat pengeluaran daripada AP dan sama ada ini telah menyebabkan ketidakmampuan plaintif untuk memulakan semula kerja pembinaan, yang mana menafikan plaintif amaun pendapatan yang substansial, dan sama ada defendan-defendan telah mengenakan terma-terma unilateral untuk menghalang plaintif membuat pengeluaran daripada kemudahan SIBA.

Diputuskan, menolak permohonan dengan kos:

(1) Fakta-fakta menunjukkan bahawa keseluruhan perkara subjek projek tersebut, yang mana membentuk asas perjanjian, iaitu tanah dan laut tidak wujud, kerana terdapat kemungkinan bahawa pajakan bagi tanah dan laut tersebut, di mana kemudahan tambahan sepatutnya dibina, tidak akan diberikan oleh Kerajaan Negeri Pulau Penang memandangkan negeri tersebut kini berada 'di tangan parti-parti pembangkang'. Oleh itu, sekiranya anggapan dibuat bahawa defendan-defendan telah menghalang plaintif daripada melaksanakan pengeluaran, ketiadaan tanah dan laut bermaksud plaintif masih tidak boleh memulakan pembinaan kemudahan tambahan tersebut. Selanjutnya, adalah menjadi keperluan mandatori surat ikatan amanah tersebut bahawa sebarang pengeluaran oleh plaintif untuk membiayai kerja pembinaan tersebut hendaklah disokong oleh dokumen-dokumen yang telah disahkan oleh sama ada jurutera atau arkitek mengenai jumlah kerja yang telah dilakukan dan keterangan dokumentari tersebut mestilah di dalam bentuk yang boleh diterima oleh defendan pertama dan kedua sebagai penerima amanah dan ejen kemudahan masing-masing. Plaintif tahu akan mekanisma ini memandangkan telah

terdapat 13 bayaran berperingkat terdahulu yang dibuat olehnya bagi pengeluaran. Walau bagaimanapun, dalam kes ini, memandangkan adalah tidak mungkin baginya untuk memulakan sebarang kerja pembinaan tanpa tanah atau laut tersebut, oleh itu, secara logik, pembayaran daripada kemudahan SIBA adalah tidak mungkin sama sekali. Justeru, hujahan plaintif bahawa ketidakmampuan untuk memulakan kerja-kerja adalah berpunca daripada tindakan defendan pertama dan kedua adalah salah tanggap yang melampau. Oleh itu, ini bukanlah isu yang boleh dibicarakan dan atas alasan ini semata-mata, permohonan plaintif boleh ditolak (lihat perenggan 40–41, 43 & 46–51).

(2) Pada 16 Disember 2008, adalah jelas bahawa plaintif, dari segi kewangan, terikat dan tidak berupaya untuk membuat bayaran tertunggak di bawah kemudahan SIBA. Fakta ini digandingkan dengan rasa khuatir sama ada perintah berhenti kerja akan dibatalkan atau bahawa terdapatnya permulaan kerja-kerja pembinaan memberi sebab bagi defendan-defendan dalam kes ini untuk bimbang. Plaintif sebaliknya telah berulang kali mengesahkan di dalam surat-suratnya kepada defendan-defendan dan seperti yang telah direkod di dalam minit-minit mesyuarat bahawa ia akan menebus kemudahan SIBA pada 17 November 2009. Disebabkan jaminan berulang kali ini oleh plaintif bahawa kemudahan SIBA akan ditebus sepenuhnya pada 17 November 2009, defendan pertama dan pemegang SIBA tidak memohon untuk pelanggaran. Oleh itu, jaminan tersebut merupakan janji-janji dan kewajipan kontraktual, yang mana mengikat plaintif dan plaintif diestop daripada menafikannya. Selain daripada kewajipan ini, plaintif juga mempunyai kewajipan sekunder untuk membuat bayaran dalam jumlah RM10,208,750 bagi kemudahan SIBA sekunder pada 17 November 2009. Oleh itu, tidak kira sama ada defendan-defendan adalah dalam pelanggaran seperti yang didakwa oleh plaintif, plaintif tidak boleh lari daripada kewajipannya untuk menebus sepenuhnya kemudahan SIBA pada 17 November 2009 dan mendapatkan bayaran bagi SIBA sekunder, yang mana juga tertunggak pada tarikh yang sama. Melihat kepada fakta bahawa bayaran bagi SIBA sekunder adalah kewajipan kontraktual, tidak terdapat justifikasi untuk permohonan injunksi untuk menghalang pembayaran sebelum 17 November 2009 (lihat perenggan 54, 63–65, 70, 72–75, 77, 111–112 & 114).

(3) Plaintif telah mengakui bahawa kerugiannya adalah dari segi kewangan semata-mata dan oleh itu ganti rugi adalah remedi yang berpatutan meskipun plaintif adalah betul dalam dakwaannya. Tambahan, memandangkan plaintif adalah sekadar alat untuk tujuan khas, tidak terdapat kebimbangan yang munasabah mengenai ia kehilangan sebarang reputasi (lihat perenggan 93 & 95).

(4) Mengeluarkan injunksi yang dipohon tidak akan menyelesaikan masalah-masalah yang dihadapi oleh plaintif tetapi ia akan sebaliknya menafikan apa yang berhak diterima oleh pemegang SIBA di bawah PK (lihat perenggan 98).

(5) Plaintif telah gagal untuk mengemukakan fakta-fakta material kepada mahkamah apabila membuat permohonan ex parte. Fakta bahawa plaintif telah berulang kali memberi akujanji untuk menebus keseluruhan kemudahan SIBA pada 17 November 2009 dan bahawa ia sedar ketiadaan tanah atau laut untuk pembinaan kemudahan tambahan merupakan fakta-fakta material, yang mana jika dikemukakan akan menyebabkan perintah ex parte tidak diberikan sejak mula lagi. Selanjutnya, memandangkan fakta-fakta material yang tidak dikemukakan dilakukan sama ada dengan sengaja atau semberono, ia akan menjejaskan plaintif daripada mendapat sebarang relief yang saksama (lihat perenggan 107, 110 & 115).]

Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3141–3171.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Central Bank of India Ltd v Hartford Fire Insurance Co Ltd AIR 1965 SC 1288, SC (refd)

Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357; [2003] 4 CLJ 294, CA (refd)

Dominic Puthucheary (Alex De Silva and Shanti Abraham Mathew with him) (Puthucheary) for the plaintiff.

Gan Khong Aik (Foo Joon Liang with him) (Abdullah Chan) for the first defendant.

Loh Siew Cheang (Kelvin Seet with him) (Cheng & Ariff) for the second defendant.

Zabariah JC:

[1] Enclosure 3 is the application by the plaintiff for injunctive relief on the terms set out in the summons in chambers dated 12 November 2009.

BACKGROUND

Origin of the plaintiff

[2] The plaintiff was incorporated in April 2004 and is a joint venture company between Bindforce Sdn Bhd and Lembaga Kemajuan Ikan Malaysia ('LKIM').

[3] The purpose of the incorporation was for carrying out upgrading works on the Kompleks LKIM at Bt Maung, Pulau Pinang and to manage and operate the said complex under the concession given by LKIM, by a concession agreement dated 16 December 2004 between LKIM and the plaintiff ('the concession agreement').

BAIS facility

[4] To finance the plaintiff's works under the concession agreement, the plaintiff issued Islamic bonds in the form of Bai Bithaman Sijil Islamic Securities facility ('BAIS facility') to the value of up to RM240m. In relation to this facility:

(a) The first defendant was appointed the trustee to act for the holders of the BAIS facility. The trust deed is in WLM3 dated 10 April 2007.

(b) The second defendant and RHB Investment Bank were appointed as the lead arrangers of the BAIS facility. The second defendant and RHB Investment Bank Bhd were also the first subscribers of the BAIS facility.

WLM4 is a duly signed copy of the Bai Bithaman Ajil Islamic Securities Issue facility and subscription agreement dated 10 April 2007 ('facilities agreement').

[5] Under the BAIS facility, the plaintiff is obliged to make payments in accordance with the following scheme:

(a) The primary BAIS securities, with an aggregate value of RM240m, are repayable upon their maturity. In this connection, the primary BAIS securities have maturities ranging from between five to ten years.

(b) Further the secondary BAIS securities are repayable twice per annum, in accordance with the schedule attached to the statement of claim as 'Lampiran A'.

[6] Of the RM240m BAIS facility, RM135m is for the financing of cost of the additional facilities (as defined in cl 1.1 of the concession agreement) ie the port, while RM40m was designated for repayment of a bridging facility given by RHB Investment Bank Bhd.

[7] Besides the above, RM33m has also been designated for repayment of the secondary BAIS during the construction period of the remaining additional facilities. Refer to cl 2(c) at p 12 of the facilities agreement and at p 17 of the

information memorandum which is at exh AZB6.

The additional facilities

[8] Clause 6.2(c)(viii) of the trust deed sets out a mechanism for the plaintiff to draw on the BAIS facility, for purposes of its construction of the additional facilities.

[9] The pertinent terms of the trust deed is that, all drawdown by the plaintiff for this purpose must be supported by invoices or certificates, or other similar forms of documentary evidence, in a form acceptable by the first and second defendants, as the trustee and facility agent respectively. Such documents must also be certified by either an engineer or an architect as to the amount of works done.

[10] In other words, the BAIS facility can only be disbursed to finance the construction of the additional facilities when the documents are produced to evidence work completed to the satisfaction of the architect or engineer.

[11] All proceeds raised from the issuance of the BAIS are captured in a bank account with RHB Islamic bank designated as the disbursement account ('DA').

[12] The DA is operated solely by the trustee and the plaintiff was only allowed to withdraw the monies from the DA in accordance with the conditions set therein.

The stop work order

[13] On 4 September 2007, the Government of Malaysia declared a stop order on the construction works carried out in relation to the project in view of new legal or regulatory requirements.

[14] This stop order was subsequently lifted by the government on 16 September 2008 and the completion date for the construction works was extended to 31 December 2010. The extension date was confirmed by LKIM which is in exh AZB10 of the affidavit in support.

Contention by the plaintiff

[15] The plaintiff alleged that on 24 September 2008 the first defendant and/or the second defendant informed the plaintiff that the construction works ought not to commence until the additional conditions, which the

plaintiff alleged was unilaterally imposed by the first defendant and/or second defendant, were met. The plaintiff further states that the first defendant and/or the second defendant evinced their intention not to permit any drawdown or withdrawals from the DA in the meantime.

[16] The defendants refused to allow the plaintiff to utilise the funds to recommence the project and insisted on the plaintiff complying with the scheduled payments dates.

[17] In the event the plaintiff fails to make payment according to the scheduled payment dates, this would trigger in the entire outstanding BAIS becoming due and payable immediately which amounts to RM378.82m.

[18] Vide a letter dated 21 October 2009, the first defendant/second defendant had directed the plaintiff to deposit RM10,208,750 into the sinking fund account by 19 October 2009. The first defendant had expressly stated that in the event that the sum of RM10,208,750 is not paid by 17 November 2009, it will be an event of default. The copy of the letter is exhibited in AZB13 of the affidavit in support.

[19] The plaintiff contends that the scheduled payments and the scheduled payment dates are only applicable and/or subject to the plaintiff having the right to utilise the proceeds to complete the construction works.

[20] The plaintiff states that at the material time the defendant knew or ought to have known that the issue of the BAIS was in relation to a contract for a definite purpose including the construction of the additional facilities. The purchase of ancillary facilities was also known to the defendant.

[21] The plaintiff contends that the defendants also knew of the stop work order on the construction works carried out in relation to the project, which was declared by the Malaysian Government on 4 September 2007. This stop work order was in view of new legal and/or regulatory requirements.

[22] The stop order was lifted by the government and/or its agency on or about 16 September 2008. The government had extended the completion date for the construction works to 31 December 2010.

[23] The plaintiff submits that at all material times the defendants also knew that the project does not provide a significant income to the plaintiff.

[24] The crucial point according to the plaintiff is that, on 24 September 2008 the first defendant and/or the second defendant informed the plaintiff

that the construction works ought not to commence until the additional conditions, which the plaintiff alleged was unilaterally imposed by the first defendant and/or second defendant, were met. Further, the first defendant and/or the second defendant evinced their intention not to permit any drawdown or withdrawals from the DA in the meantime. According to the plaintiff, these new conditions were not pursuant to any proper exercise of power under the BAIS and/or the issue documents.

[25] On 14 November 2008, the plaintiff informed the first defendant that it would be able to recommence works on the remaining additional facilities. However, according to the plaintiff, it was prevented from commencing with the works because the defendants started to unilaterally impose numerous terms and conditions and the refusal of the defendants to allow further drawdowns or withdrawals from the DA.

[26] This was of course objected to by the plaintiff, which was communicated to the defendants.

[27] The plaintiff informed the trustee that LKIM had approved a revised completion date for the remaining additional facilities until 31 December 2010.

[28] Notwithstanding the plaintiff informing the defendants that it was ready and willing and able to recommence construction and that LKIM had extended the completion date for the construction of the additional facilities to 31 September 2010, the defendants refused to allow the plaintiff further drawdown and withdrawals from the DA. Accordingly, the plaintiff was unable to proceed with the construction of the construction works and the project was effectively halted as a result of the conduct of the defendants.

[29] On 16 December 2008 the first defendant expressly took the view that 'there should not be any further drawdowns in the meantime' although the government had shortly before given express assurances to the defendants regarding the viability of the project at a meeting on 21 November 2008.

[30] The defendants continue to refer to the scheduled payments dates for compliance.

[31] The first defendants had directed the plaintiff vide a letter dated 21 October 2009, to deposit RM10,208,750 into the sinking fund account by 19 October 2009. The said letter is in exh AZB13. The letter further states that in the event the sum of RM10,208,750 is not paid by 17 November 2009, it will be an event of default. The first defendant has stated that the failure to make such deposit by 19 October 2009 constitutes a breach of cl 6A.5(a)(i) of the

trust deed and that the first defendant requires compliance with the same by 17 November 2009 failing which it will call an event of default.

[32] The above matter was raised by the plaintiff with the first defendant who is the trustee for the BAIS holders vide a letter from the solicitors for the plaintiff dated 10 November 2009 with a request that the first defendant confirm, inter alia, that they would refrain from declaring an event of default against the plaintiff. The first defendant indicated that they would be unable to revert and neglected to confirm that they would refrain from declaring an event of default against the plaintiff.

[33] The plaintiff further submits that there has been government participation in this case in that there has been discussions to resolve the outstanding matter and that at a meeting with the Minister of Agriculture and Agro-based Industry on or about 9 November 2009 where, the Minister gave the plaintiff the assurance that the government would be looking into the matter in conjunction with its undertaking, inter alia, as set out in the letter of support dated 2 October 2006. This was communicated to the defendants via exh AZB14 letter.

[34] It is the contention of the plaintiff that in the event the first and the second defendants are not restrained immediately from calling an event of default against the plaintiff, the first defendant and/or the second defendants are likely to call an event of default, which will result in the following:

(a) the first defendant will be entitled to require an immediate payment of the outstanding BAIS and to enforce all the security documents;

(b) the plaintiff will be in default of the concession agreement and the objective of the concession agreement will be immediately defeated as the first defendant will only be seeking payment of the BAIS.

[35] Hence the application by the plaintiff in encl 3 herein.

THE COURT'S FINDINGS

[36] The basis of the application by the plaintiff herein is essentially premised on the alleged act of the first defendant in preventing the drawdown, which has caused to the inability of the plaintiff to proceed with the construction of the additional facilities, resulting in there being no substantive income to the plaintiff.

[37] The pre-requisites for a prohibitory injunction are:

(a) whether there are serious questions to be tried;

(b) whether damages adequate remedy in the event the plaintiff succeeds at trial; and

(c) the balance of convenience.

Whether there are serious issues to be tried

[38] The crucial point that needs to be determined by me for the purposes of the application herein is whether from the facts the defendants had prevented the plaintiff from drawing down on the BAIS facility which resulted in the plaintiff's inability to proceed with the construction of the additional facilities, which deprived the plaintiff of a substantial amount of income.

The absence of the substratum of the agreement

[39] Before I proceed to determine on the issue as to whether the defendant did in fact prevent the plaintiff from drawing down on the BAIS facility, I need to address on one crucial issue which essentially will determine the entire application.

[40] What is glaring in the face of the court is that, the facts shows that the entire subject matter of the project does not exist in the first place. The subject matter of the project which constitutes the substratum of the agreement ie the land and the sea is not there. How is the plaintiff to commence construction works on the additional facilities when there is no land or sea to work on?

[41] Paragraphs 5–7 of the plaintiff's third affidavit avers that there is a probability that the leases to the land and sea, where the additional facilities were to be constructed, may never be given by the current State Government of Penang as the current State of Penang is now 'in the hands of the opposition parties'.

[42] However these claims by the plaintiff ie knowledge only obtained on 9 November 2009 is inconsistent with the facts of the case herein:

(a) Firstly, there are at least five senior LKIM officials, including the Ketua Pengarah, who sits on the board of directors of the plaintiff. With the presence of these senior LKIM's officials in the plaintiff's, how can the plaintiff not know of LKIM's failure to meet their sublease obligations.

(b) Secondly, the State of Penang had been 'in the hands of the opposition' since 8 March 2008, after the general elections. When the letter of 14 November 2008 was written by the plaintiff. The plaintiff would have known of the difficulties.

(c) Thirdly, from the minutes of the meeting on 12 May 2009, the plaintiff had already known of the difficulty that loomed ahead of them as to the subleases.

[43] Therefore, even if I am to presume that the defendants did prevent the plaintiff from executing the drawdown (which at this point of my judgment has not been determined), the plaintiff would still not be able to recommence works on the additional facilities without the existence of the land and the sea.

[44] Thus, it is highly misconceived for the plaintiff to allege that their inability to recommence work on the additional facilities was due to the defendant's act of prohibiting the drawdown.

[45] Following from the non-existence of the land and the sea, works on the additional facilities cannot recommence.

[46] Clause 6A.2(viii) of the trust deed (exh WLM3 of encl 14) sets out a mechanism for the plaintiff to draw on the BAIS facility. It is the express requirement that any drawdown by the plaintiff for this purpose must be supported by invoices or certificates, or other similar forms of documentary evidence, in a form acceptable by the first and the second defendants respectively, as trustee and the facility agent respectively. It is the mandatory requirement that such documents must also be certified by either the engineer or an architect as to the amount of works done.

[47] The BAIS can only be disbursed to finance the construction of the additional facilities when the documents as mentioned above are produced to show that the work has been completed to the satisfaction of the architect or engineer. The plaintiff knew of this mechanism as there has been 13 previous progress claims made by the plaintiff for drawdown, the last being in March 2008. All these 13 progress claims have been paid.

[48] For this mechanism to be operative, there must be work done before it can be certified by an architect and an engineer. Only then a claim can be made by the plaintiff for the drawdown. But, in the present case, since it is not possible to commence any construction work without the land and the sea, then logically disbursement from the BAIS facility is next to impossible.

[49] Hence, the contention that the inability of the plaintiff to commence works is attributed to the act of the first or the second defendants, is grossly misconceived.

[50] Therefore it is a futile exercise if the court is to determine whether it was the defendant that had stopped the plaintiff from drawing down on the BAIS facility which caused the plaintiff's inability to proceed with the construction of the additional facilities resulting in no income to the plaintiff. This is therefore not a triable issue.

[51] On this ground alone, the application by the plaintiff can be dismissed without me going into the other issues. However for completeness, I will address the other points raised by both parties in their arguments.

Whether the defendants have imposed unilateral terms and conditions that prevented the drawdown by the plaintiff of the BAIS facility

[52] Firstly, I have to determine whether the plaintiff has fulfilled the requirement before making any drawdown, which the plaintiff alleged was refused/prevented by the defendants. For this it is pertinent to scrutinise the chronology of the events which led to the problems faced with regards to the additional facilities.

[53] From the affidavits of the first defendant, it is averred that before 24 September 2008 the first defendant received a letter dated 24 September 2008 from the second defendant (exh WLM5) being one of the holders to the BAIS securities recording the proceedings of a briefing on 9 September 2008 by the plaintiff's representatives. The second defendant's letter states that the plaintiff had made known the following difficulties faced by the plaintiff:

(a) Sometimes in September, the Jabatan Alam Sekitar, Pulau Pinang ('JASPP') had imposed a ban on dredging works at the site of the additional facilities. Further, there were some delays in the relocation of fish culture operators in the vicinity of the site of the additional facilities. As of 24 September 2008, these matters had caused a delay of about a year in the construction of the additional facilities.

(b) As of 24 September 2008 the plaintiff had yet to secure any extension of time from LKIM to complete the additional facilities. The completion date was to be 31 May 2009, and the plaintiff had informed that they would not be in a position to complete the additional facilities by 31 May 2009.

(c) The plaintiff also estimated that it would incur cost overruns in the region due to the delays in the construction process.

(d) The European Union had imposed a ban on all Malaysian seafood in June 2008. This adversely affected the plaintiff's business.

[54] The second defendant, in its capacity as a BAIS holder were concerned of these difficulties as mentioned in paras (a)–(d) above, faced by the plaintiff and requested that the first defendant to ask the plaintiff to have these concerns resolved before recommencing construction works. Amongst the pertinent points which were stated in the said letters by the first defendant are:

> Please be informed that we are extremely concerned over the above events and believe that a 'Material Adverse Effect' event(s) on MITP has occurred. Under Clause 7.1 (u) of the Trust Deed dated 10 April 2007, it is an Event of Default if any event or events has or have occurred or a situation exists which in the opinion of the Trustee may have a material adverse effect on MITP, and in the case of the occurrence of such event or situation which in the opinion of the Trustee is capable of being remedied, is not remedied within sixty (60) days of the notice remedy period.
>
> Hence we strongly request that the Trustee immediately inform MITP of the above and that MITP must resolve the following issues, satisfactory to the Bond Holders prior to it recommencing the construction of the remaining Additional Facilities:
>
> (1) MITP shall have obtained written approval from LKIM for an extension of time to no earlier than 31 May 2010 to allow it time to complete the construction of the remaining Additional facilities, as otherwise, it will trigger an Event of default under the Concession Agreement dated 16 December 2004;
>
> (2) MITP shall have deposited approximately RM45.0 million–RM 50 million into the Disbursement Account to ensure that there are sufficient funds to finance the cost overruns incurred due to the delay in completing the construction of the remaining Additional facilities. otherwise there will not be enough funds to complete the construction of the remaining Facilities: …

[55] The first defendant forwarded the second defendant's vide a letter dated 24 September 2008 to the plaintiff for the plaintiff's written response (exh WLM5 of encl 14).

[56] A perusal of the contents of the letter in exh WLM5 does not show any direction by the first defendant to the plaintiff, directly or indirectly, for the plaintiff not to recommence the construction works. The contents of the letter of the second defendant only voiced the concern of the BAIS holders on the recent state of events (ie predicaments of the plaintiff) that has since occurred and requesting that the first defendant to remind the plaintiff of the terms of the concession agreement and how the plaintiff proposed to resolve the issues that have arisen. In any event, even if such an 'injunctive order' is to be enforced by the defendants, there are certain prescribed procedures that needs to be followed first, under the trust deed.

[57] There was a response by the plaintiff to the letter by the first defendant dated 26 September 2008 (exh WLM6 of encl 14). Vide this letter dated 26 September 2008, there was no mention of the plaintiff at that point in time

being ready to recommence construction works. It only states that the plaintiff would only reconvene a meeting of the board of directors after the Hari Raya break to decide on the next course of action.

[58] However in mid November 2008, the plaintiff issued out a letter dated 14 November 2008 (exh WLM7 of encl 14) informing the first defendant that:

(a) JASPP and the Jabatan Perikanan Pulau Pinang had cleared the issues of the dredging and the relocation works were completed by 23 September 2008, and that the plaintiff was in a position to recommence construction works on 23 September 2008. There was no record of any letter from the plaintiff prior to this informing the first defendant that the stop work order had been lifted.

(b) LKIM had given an extension until 31 December 2010 for the plaintiff to complete the construction works.

[59] In the same letter, the plaintiff stated that the first defendant had prevented the plaintiff from commencing with the construction works. The relevant portion of the said letter states as follows:

...

3. As such we were able to re-commence works on the remaining Additional Facilities on 24 September 2008, but we have not done so because of your letter of 24 September 2008.

4. Your letter of 24 September 2008 asserts by adoption OSK Investment Bank Bhd's statement in their letter of the same date, which states as follows:

> Hence we strongly request that the Trustee immediately inform MITP of the above and that MITP must resolve the following issues, satisfactorily to the Bondholders prior to re-commencing the construction of the remaining 'Additional facilities' which clearly has an injunctive effect and prevented us from re-commencing works.

5. As time is of the essence to complete the project your unilateral injunctive 'order' is made in total disregard to the issues with Jabatan Alam Sekitar and Jabatan Perikanan Pulau Pinang having been resolved and caused us construction delays with consequential material and adverse financial effects on MITP and the project. We reserve our rights and remedies against you in this regard …

[60] Pursuant to the said letter above, the first defendant wrote a letter dated 26 November 2008 (exh WLM8 of encl 14) to the plaintiff, in which the first defendant amongst other things stated that:

(a) It was only when the first defendant received the plaintiff's letter of 14

November 2008 that the first defendant was informed that the plaintiff was in a position to recommence the construction works on 23 September 2008.

(b) Despite the time period of 60 days given to the plaintiff, the plaintiff has yet to revert on the other outstanding information, such as the revised project cash flow projections, and the manner in which the plaintiff would resolve the cost overruns.

(c) The first defendant did not injunct the plaintiff from recommencing construction works as alleged.

(d) The plaintiff had not made any drawdown request since 17 March 2008.

[61] However, there was no respond from the plaintiff to this letter.

[62] Subsequently, a meeting was held on the 21 November 2008 which was attended by the plaintiff together with officers from the Ministry of Finance. Nothing was mentioned by the plaintiff at the said meeting that the defendants has caused problems to the plaintiff which prevented the plaintiff from recommencing work on the additional project. A perusal of the minutes of the said meeting held on 21 November 2008 which is exhibited in AZB12 of encl 7 shows that at that point in time, it was already apparent that the plaintiff was faced with financial difficulties and would be unable to make payments due under the BAIS facility. The relevant portion of the minutes states at para 2 as follows:

iv. Projek ini dilaksanakan dalam 3 fasa di mana fasa pertama dan kedua telah disiapkan manakala fasa ketiga yang merupakan fasa utama masih belum dimulakan kerena menghadapi masalah pematuhan lapuran EIA dan pemindahan penternak ikan dalam sangkar berhampiran.

v. Projek ini telah diberi lanjutan masa (EOT) sebanyak dua (2) kali dan kali terakhir ianya telah dilanjutkan sehingga tahun 2010. Akibat daripada lanjutan masa ini kos projek telah meningkat kepada RM289 juta daripada RM243 juta iaitu lebihan sebanyak RM46 Juta. Akibat kelewatan projek ini, pihak OSK Trustees telah meminta supaya sejumlah RM45 Juta didepositkan kedalam Disbursement Account sebagai jaminan projek tersebut diteruskan.

vi. Kementerian Kewangan telah menerima permohonan pinjaman mudah daripada MITP melaui Menteri Pertanian dan Industri Asas Tani melalui suratnya bertarikh 19 November 2008 sebanyak RM23 Juta untuk bayaran faedah yang dikenakan ke atas pinjaman daripada OSK Investment Bank yang perlu dibayar selewat-lewatnya pada 21 November 2008. Sekiranya bayaran tidak dibuat, perjanjian OSK Trustees dan MITP akan terbatal dan MITP perlu membayar semula keseluruhan pinjaman.

vii. Memandangkan projek tersebut merupakan projek nasional dan berdaya maju

untuk jangka masa panjang serta pihak kerajaan mempunyai kepentingan melalui LKIM, Kementerian Kewangan sedaya upaya cuba membantu bagi menyelesaikan masalah ini.

viii. Pihak OSK Investment Bank juga memaklumkan bahawa mereka juga bertanggungjawab ke atas pendeposit kerana MITP tidak memberi apa-apa maklum balas mengenai status projek tersebut walaupun telah diminta berbuat demikian.

Keputusan Mesyuarat

3. Mesyuarat memutuskan supaya:

i. Pihak OSK Investment Bank diminta menangguhkan pengishtiharan Default payment ke atas MITP.

ii. Kementerian Pertanian Industri dan Asas tani (MOA) mengeluarkan Surat sokongan (*letter of comfort*) kepada LKIM mengenai komitmen Kerajaan terhadap projek ini. MOA diminta menyemak peruntukan sedia ada bagi membantu LKIM mengatasi masalah ini.

iii. LKIM diminta menyemak kedudukan rizab kewangannya untuk memastikan samada is mempunyai dana yang mencukupi untuk memberi pendahuluan kepada MITP untuk membayar kenaan faedah.

iv. MOA/MITP perlu mengadakan pertemuan dengan pemegang bon bagi memberi keyakinan bahawa projek tersebut akan diteruskan. MITP juga perlu mengemukakan permohonan melalui LKIM bagi tujuan pinjaman mudah ini.

v. MITP perlu segera menguruskan permohonan pinjaman daripada Affin Bank Berhad bagi menebus kesemua bon dan membiayai kos pembangunan projek tersebut …

[63] It is clear at this stage that due to the delay and costs overruns, the plaintiff had recognised that it was financially strapped and was unable to make payments due under the BAIS facility.

[64] As of 16 December 2008 the plaintiff has yet to satisfactorily respond to the first defendant and all BAIS holders on its finances and the expired contract between the plaintiff and its contractors, See Song & Sons Sdn Bhd. Following that, a letter dated 16 December 2008 the first defendant requested the plaintiff to address these matters on or before 30 January 2009. Based on those circumstances pending the response from the plaintiff, the first defendant expresses a view that there should not be any more drawdowns as the construction contract with the contractor had lapsed.

[65] With financial difficulties faced by the plaintiff for the construction as early as 21 November 2008, it is not surprising that the first defendant became overly concerned. The view expressed by the first defendant must be viewed in the light of the fact that the plaintiff could not be allowed to drawdown to

finance construction works if the status of the construction was still in doubt and there was no assurance of an ongoing construction.

[66] As of 10 February 2009 the first defendant had yet to receive a response to its 16 December 2008 letter despite numerous reminders. By a letter of 10 February 2008 (exh WLM10 of encl 14) the first defendant then gave the plaintiff 60 days to furnish its response.

[67] There was no action or response from the plaintiff until April 2009. By a letter dated 23 April 2009 (exh WLM11 of encl 14) the first defendant recorded a brief chronology of the prior events and the fact that information was still outstanding from the plaintiff, notwithstanding four previous notices of breaches.

[68] This letter specifically states the request by the plaintiff on 10 April 2009 for indulgence on the part of the first defendant, so that an event of default is not called. Hence, it is clear that as of 10 April 2009, at the latest, the plaintiff knew that it had difficulties with the construction of the additional facilities.

[69] Pursuant to the 23 April 2009 letter, a meeting was held between the plaintiff, the first defendant and the BAIS holders on 30 April 2009.

[70] From the minutes of the 30 April 2009 meeting (exh WLM12 of encl 14), Dato' Annuar Zaini bin Binyamin of the plaintiff (he is the deponent of the plaintiff's second and third affidavits herein) repeatedly affirmed and confirmed that the entire BAIS facility would be redeemed by November 2009. This is clear from the minutes which are as follows:

> 3.1 EF enquired as to how MITP was seeking to redeem this amount this November. AZ replied that although MITP is undergoing some 'family problems', this will be sorted out amongst themselves. They do not wish to disclose how but they do intend to declare to the BAIS Holders that they will redeem in November and until then they will not be using BAIS Holders' money. *He added that there will be no drawdown from now until November*. (Emphasis added.)
>
> 3.2 RT asked for an indicative timing as to payment of interest. AZ replied that no matter what happens, MITP is committed in paying. If MITP pays anytime before November 2009, BAIS Holders will receive less interest. If MITP pays on 17 November 2009 itself, BAIS Holders will receive the full interest.
>
> 3.3 ...
>
> 3.4 YYH voiced concerns as to what would happen if the redemption does not take place. *AZ mentioned that MITP is bound by the book and it is a fact that MITP has*

to abide by the Concession Agreement. AZ once again reiterated that MITP intends to make the redemption and that BAIS Holders should not be concerned with how this would be done.

3.5 EF mentioned that it is rather difficult for BAIS Holders to report to their respective committees whether to waive the breach when they are not given sufficient information such as where the money is coming from and what happens if there is no money by November 2009. AZ merely stated that MITP has made their decision in 'good faith' (to pay) and that likewise, BAIS Holders have their own decision to make. If *there is indeed no money by November 2009, BAIS Holders can rely on provisions in the book and take the necessary steps available.* (Emphasis added.)

[71] It is pertinent to note that at that meeting the plaintiff also informed BAIS holders and the first defendant that the plaintiff *will not make a drawdown* until November 2009.

[72] Thereafter on 19 May 2009 (exh WLM13 of encl 14) the plaintiff confirmed their undertaking at the 30 April 2009 meeting. By its letter of 19 May 2009 the plaintiff confirmed that:

(a) the plaintiff *would make full redemption of the BAIS facility by 17 November 2009*; and

(b) *until 17 November 2009 date the plaintiff would not be making any drawdown from the BAIS facility*.

[73] The plaintiff further repeatedly affirmed that they would redeem the BAIS facility by 17 November 2009, including at meetings with the first defendant and the BAIS holders on 12 May 2009 and as late as 15 October 2009, one month before the ex parte application for the injunction.

(The minutes of the meeting of 12 May 2009 is in exh WLM14 of encl 14).

[74] Due to the repeated assurances by the plaintiff that the BAIS facility would be fully redeemed by 17 November 2009, the first defendant and the BAIS holders have not called for an event of default. Numerous indulgences were given by the first defendant and the BAIS holders to the plaintiff for them to resolve all outstanding issues. If not for these assurances, events of default would have been called by the first defendant and the BAIS holders as early as in March 2009.

[75] As such, these assurances by the plaintiff to the defendants are therefore binding on the plaintiff. The assurances amounts to promises and contractual obligations on the part of the plaintiff — ie to fully redeem the BAIS facility by 17 November 2009. Consequently, the plaintiff is thereby estopped from denying these obligations by saying that they are not obliged to fully redeem

the BAIS facility on 17 November 2009. Refer to *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283.

[76] Therefore, base on the abovementioned, it is the plaintiff's repeated undertaking that the BAIS facility will be fully redeemed by 17 November 2009, and it is only fair that the plaintiff fulfill that undertaking.

Secondary BAIS

[77] Besides the plaintiff's obligation to make full redemption of the BAIS facility on 17 November 2009, it has been the plaintiff's obligation from the outset of the BAIS facility that a payment of the secondary BAIS facility, in the sum of RM10,208,750 be made on 17 November 2009.

[78] The obligation to make payment of the secondary BAIS by 17 November 2009 was also recorded in the first defendant's letter dated 4 May 2009 to the plaintiff (exh WLM17 of encl 14).

The Sinking Fund Account ('SFA')

[79] Clause 6A.5(a)(i) of the trust deed requires the plaintiff to ensure sufficient funds to meet the secondary BAIS payment one month prior to the payment date.

[80] Given that a secondary BAIS payment in the sum of RM10,208,750 was due on 17 November 2009, the plaintiff was contractually obliged to ensure that, the amount was available in the SFA by 19 October 2009.

[81] However as at 21 October 2009 the plaintiff failed to make such payment into the SFA. As such by a letter dated 21 October 2009 (exh WLM18 of encl 14) the first defendant put the plaintiff on notice that in the event the RM10,208,750 is not paid into the SFA by the plaintiff, this would be an event of default.

Payments due on 17 November 2009

[82] In summary, the following payments were due under the BAIS facility on 17 November 2009 were:

(a) redemption of the entire BAIS facility; and

(b) the plaintiff was also obliged to pay the secondary BAIS of RM10,208,750 on 17 November 2009. The obligation to top up the SFA in respect of this payment fell due on 19 October 2009.

[83] Essentially in summary, the plaintiff did not make a request for drawdown after March 2008, and certainly did not submit those required documents for a drawdown. Since there was no request for drawdown, how could there be any rejection for drawdown.

[84] In view that neither of the defendants have stopped any withdrawals by the plaintiff from the disbursement account, they are not issues of law applicable to the facts in the present matter.

[85] The plaintiff in its submission emphasised that the plaintiff was set up pursuant to a national policy of the government to reduce the food deficit, particularly in the demand for fish. This policy of the Malaysian Government was initiated because of a certain urgency in closing the food deficit gap. If the Malaysian Government succeeds in this project, it will have a very important impact on the economy of Malaysia in various ways.

[86] The plaintiff further submits that what is important is that if the defendants are allowed to call an event of default or to enforce the terms of the facility agreement before the plaintiff is given the time to resolve the issues and disputes in accordance with the concession agreement, it will be a national loss which cannot be put together again. But if the court allows the injunction to prevail and there is a standstill until such time as the plaintiff is able to resolve the dispute with LKIM by means of arbitration or conciliation, they will be able to solve the problem, not only the defendants but also the plaintiff, and save the national project.

[87] The plaintiff states that to maintain until such time as the matters are resolved by a judicial process of arbitration which is provided for in the concession agreement or by negotiations for the government, the defendants do not lose anything except that there is a delay in resolving whatever financial liabilities.

[88] On the role played by the government in this project, I do not see how this fact, can materially affect whatever terms and obligations that have been agreed upon by the plaintiff and the defendants in the concession agreement.

[89] It is trite law that parties are bound by the terms of the contract that they have entered into, in the absence of fraud. How does one determine the intention of the parties? This point was explained by the Court of Appeal in the case of *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357;

[2003] 4 CLJ 294 which cited the case of *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, states at p 1290:

> Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[90] Hence it is pertinent that the court must give effect to what has been agreed to between the plaintiff and the defendant.

[91] Moreover, the government is not a party to these proceedings, hence questions concerning the government are not issues to be tried in this matter. Essentially, the 'undertaking/underwriting by the Government of Malaysia' does not absolve the plaintiff of its obligation and liabilities under the BAIS facility. Even if the plaintiff is correct in its contention with regard to the undertaking/underwriting, it just provides the defendants with an alternative remedy. It does not absolve the liability of the plaintiff to make good sums due under the BAIS facility.

[92] It is also not in dispute that the plaintiff itself is unsure as to when the disputes/issues that it is facing can be resolved. Therefore, the plaintiff cannot expect the court to restrain the calling for an event of default until such time when the disputes/issues are being resolved by the plaintiff. The question is 'when'? Even the plaintiff is unsure specifically when the disputes can be resolved. In any event, these facts are irrelevant as the obligations and liabilities of the plaintiff under the BAIS facility are clear.

Damages is an adequate remedy

[93] As far as damages is concerned, the plaintiff had admitted that its losses are purely monetary. It is thus an adequate remedy even if the plaintiff is correct in its allegation.

[94] The second defendant is a major financial institution, whilst the first defendant is substantially owned by the second defendant. Moreover, the first defendant is indemnified by all BAIS holders, which in turn also consists of major financial institutions. There is therefore no concerns that the defendants would be unable to compensate plaintiff in damages in the event the plaintiff succeeds here.

[95] Secondly, the plaintiff is merely a special purpose vehicle, with no prior track record or reputation. There can therefore be no legitimate concerns about the plaintiff losing any reputation.

[96] Refer to the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. At p 4098C Lord Diplock said:

> ... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage …

[97] On the present facts, whatever may be the strength of the plaintiff's case, and the damage that the plaintiff was complaining was monetary and hence damages were not only adequate but the only remedy. The defendants are in a position to satisfy the any claim the plaintiff may prove against them at trial, therefore I am not dispose to continue the ex parte injunction which I had granted earlier.

Balance of convenience

[98] Even if an event of default is not called for, the construction project cannot proceed, as the issues of the land and the sea is still unresolved. Consequently, the plaintiff will not earn the funds to make payment under the BAIS facility. In short, issuing the injunction prayed for by the plaintiff will not resolve the problems the plaintiff now faces. In fact, it will deprive the BAIS holders of what they are entitled to under the concession agreement.

[99] In the interest of the BAIS holders, which comprises most of the major financial institutions in Malaysia, it is in the interest of the BAIS holders to be able to exercise their remedies immediately to minimise losses.

[100] As for the alleged defeat of the objective of the concession agreement, this is purely speculative. It cannot be the objective of the concession agreement that the BAIS holders be prevented from their remedies in law even when the plaintiff is in default. In any event, MITP's obligation to the BAIS holders under the BAIS facility are independent of MITP's alleged rights or obligations under the concession agreement.

INADEQUATE UNDERTAKING AS TO DAMAGES

[101] The plaintiff has given an undertaking which is bare, with no evidence to support in its ability to compensate the defendants for damages.

[102] In this connection the first defendant has specifically challenged the plaintiff's ability to so compensate the defendants. In particular, the plaintiff have themselves concede that their only source of substantial income is from the operation of the additional facilities, which has been brought to a halt. Further the plaintiff is even unable to settle its own operating expenses.

[103] In these circumstances the plaintiff's undertaking as to damages is worthless and for this reason the injunctive relief sought should not be given.

DELAY

[104] The plaintiff's complaint against the defendant is that the alleged refusal by the defendants of the plaintiff's drawdown on the BAIS facility has caused the inability of the plaintiff to meet its payment obligations thereunder.

[105] The alleged refusal of the drawdown, on the plaintiff's own evidence took place through the first defendant's 16 December 2008 letter (exh WLM9). This alleged act of the defendants took place some 11 months before these proceedings and encl 3 were filed.

[106] In relation to this, the first defendant's letter of 21 October 2009 only concerned the top up of the SFA and not full redemption of the BAIS facility or the payment of the secondary BAIS, both of which were due on 17 November 2009. The plaintiff knew as of May 2009 at the latest that the full redemption was due on 17 November 2009 (this was when the plaintiff themselves undertook to fully redeem the BAIS facility). The plaintiff also knew from the time the BAIS facility was entered into when the secondary BAIS payments are due as these are scheduled payments.

[107] Delay is fatal to applications for injunctive relief. In this case the delay in bringing encl 3 is fatal.

NON-DISCLOSURE OF MATERIAL FACTS

[108] When making the ex parte application before this court, the plaintiff has failed to disclose the fact that the plaintiff had repeatedly given the undertaking that the plaintiff will redeem the entire BAIS facility on 17 November 2009. These undertakings were given by the plaintiff on various occasions ie:

(a) at the 30 April 2009 meeting (minutes at exh WLM12 of encl 14);

(b) at the 12 May 2009 meeting (minutes at exh WLM14 of encl 14); and

(c) via letter dated 19 May 2009 (exh WLM13 of encl 14).

[109] These undertakings to fully redeem the BAIS facility by 17 November 2009 *was made after* the defendants allegedly had prevented the plaintiff from recommencing the construction works and from making further drawdowns.

[110] In fact, the other crucial fact that was not fully disclosed to the court is that, the minutes of the 12 May 2009 meeting was not produced in its entirely when the request for the ex parte order was made. The plaintiff submits that some of the pages of the minutes of the said meeting were left out inadvertently during photostating. However, be that as it may, this inadvertence has resulted in some very crucial facts as not being disclosed to the court, which has a bearing on the ultimate decision on whether the ex parte order should have been granted. The missing minutes of the said meeting which was not before the court at the ex parte stage reads as follows:

> 2.1.2. Pajakan Tanah
>
> (a) MITP memaklumkan bahawa pihak mereka telah tersalah maklum (*misrepresented*) kepada Suruhanjaya Sekuriti … yang mana pajakan tanah milik KPTG masih belum didaftarkan ke atas nama LKIM dan seterusnya dipajakkan kepada MITP ketika perjanjian ditandatangani. Ini akan menimbulkan masalah kepada MITP kerana MITP mengesahkan kepada SC bahawa tanah tersebut telah dipajak kecil kepada mereka. Malah, pajakan kawasan *sea area* juga masih belum dipajak kecil kepada MITP. KP LKIM menyedari bahawa LKIM terlepas pandang dan sedang mengambil tindakan tentang pajakan tanah ini.

[111] From these missing minutes of the said meeting, it shows that, as at 12 May 2009, the plaintiff already knew that there is no land and the sea for the additional facilities to be constructed. The land and the sea are the entire substratum of the construction project. Without the land/sea, no work can be done which means, how can a drawdown be possible, as verification on the works done have to be made first before any drawdown is possible. Had I been informed of this material fact, the ex parte order would not have been granted in the first place.

[112] Consequently, regardless of whether the defendants were in breach as alleged by the plaintiff, the plaintiff cannot run away from its obligation to fully redeem the BAIS facility on 17 November 2009.

[113] Besides the obligation to fully redeem the BAIS facility, the secondary BAIS was also due on 17 November 2009. This payment obligation has already been in place since the outset of the BAIS facility, regardless whether the plaintiff was to fully redeem the BAIS facility by 17 November 2009.

[114] There is another obligation on the part of the plaintiff, ie as to the topping up of the SFA on 17 November 2009. This is a contractual obligation

to ensure the payment of the secondary BAIS on 17 November 2009. As such, whether or not the first defendant is entitled to issue the 21 October 2009 letter with regard to the SFA, the fact remains that the plaintiff was in any event obliged to pay the secondary BAIS on 17 November 2009.

[115] In view that the payment of the secondary BAIS is a contractual obligation which has been in place at the outset of the BAIS facility, there is no justification for the application for an injunction to prevent the payment before 17 November 2009, when the BAIS facility would have been due.

[116] From the facts disclosed herein, the non-disclosure as to the material facts were either deliberate or reckless and these would disentitle the plaintiff of any equitable relief.

[117] Enclosure 3 is therefore dismissed with costs, and damages to be assessed.

Application dismissed with costs.

Reported by Kohila Nesan